Supreme Court, U.S.
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No. 04-1324

# In the Supreme Court of the United States

PATRICK A. DAY,

*Petitioner*,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

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The State spends little time addressing the splits among the circuits or the importance of resolving them. The State does point out that the Habeas Rules were recently amended, but those amendments are not substantive and do not affect the circuits' conflicting holdings on the questions presented. After this petition was filed, the en banc Third Circuit divided 7-5 on those questions, deepening the conflict and confirming that this Court's review is needed.

On the merits, the State argues that Day would receive a "windfall" if this Court finds a waiver of AEDPA's limitations defense. This argument ignores the many reasons why our adversary system makes parties responsible for raising their own affirmative defenses. The State next contends that Day was not prejudiced by the *sua sponte* dismissal of his petition as untimely because he never argued it was timely. Yet the record is clear: Day did argue that his petition was timely, and Sixth Circuit precedent supports his argument. Finally, the State contends that certain policies behind AEDPA trump the text of the Rules of Civil Procedure. Because nothing in AEDPA's text is inconsistent with the Civil Rules regarding waiver, however, those rules apply here. The Eleventh Circuit erred by holding otherwise.

### A. The circuit splits presented here are genuine and have deepened.

The State never raised a limitations defense in the district court. To the contrary, its answer conceded that Day's petition was timely. Months later, however, the district court dismissed the petition as untimely *sua sponte*.

Six courts of appeals have now addressed this recurring factual scenario. The State does not dispute what the Eleventh Circuit expressly acknowledged and the Third Circuit has now confirmed: courts are divided over whether such a dismissal is proper. Pet. App. 6a; *United States* v. *Bendolph*, 409 F.3d 155, 164 (3d Cir. 2005) (en banc).

First, unlike the Eleventh Circuit, four circuits hold that a State waives the limitations defense by failing to plead it in an answer or otherwise raise it in the district court.[1] Second, three circuits now reject the Eleventh Circuit's view that Habeas Rule 4 authorizes *sua sponte* dismissal after an answer has been filed.[2] See Opp. 5, 12 (conceding disagreement over when district court may raise limitations *sua sponte*).

The State attempts to brush aside these splits of authority, preferring instead to argue about which position is correct on the merits. The State's few responses to the splits do not minimize their existence or the importance of resolving them.

1. The State's primary contention is that most of the circuits—including the Eleventh Circuit itself—weighed in on these splits before amendments to Habeas Rules 4 and 11 took effect on December 1, 2004. Opp. 7, 9. Yet those amendments do nothing to resolve the splits or diminish their continuing importance. As the State grudgingly concedes

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[1] Compare Pet. App. 4a (habeas case "not controlled by" rule that failure to plead limitations "constitutes a waiver") with *Bendolph*, 409 F.3d at 164 (reaffirming Third Circuit rule that "limitations period is not jurisdictional and therefore is subject to * * * waiver"); *Nardi*, 354 F.3d at 1141 (State "waives the statute of limitations by failing to raise the defense in its answer"); *Scott*, 286 F.3d at 928 (failure to raise limitations defense in first responsive pleading "amounted to a waiver"); see also Pet. 9-11.

[2] Compare Pet. App. 4a-5a (Rule 4 authorizes *sua sponte* dismissal even "after the [S]tate has filed a response * * * that does not raise" limitations defense) with *Bendolph*, 409 F.3d at 157 (case is not "within the summary dismissal period of Rule 4" after government files answer "that [does] not raise" limitations); *Nardi*, 354 F.3d at 1141 (district court "lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the [S]tate files an answer which fails to raise the statute of limitations defense"); *Scott*, 286 F.3d at 930 (Rule 4 power to dismiss petition *sua sponte* "expires when the judge orders a respondent to file an answer").

near the end of its brief (at 17-18), the advisory committee notes to both rules state (with a few exceptions not relevant here) that the amendments are simply "stylistic" and that "no substantive change is intended." Indeed, this Court confirmed just last month that the amended rules "are not materially different" from the prior versions. *Mayle* v. *Felix*, 125 S. Ct. 2562, 2566 n.1 (2005).

A review of the specific amendments to Rules 4 and 11 confirms that they do not substantively impact the circuit conflicts at issue here. Habeas Rule 4 governs the judge's preliminary examination of a habeas corpus petition. Prior to the amendments, it provided:

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * *. Otherwise the judge shall order the respondent to file an answer * * *.

The amended version provides:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition * * *. If the petition is not dismissed, the judge must order the respondent to file an answer * * *.

The replacement of the word "otherwise" with the phrase "[i]f the petition is not dismissed" confirms Day's position that the district court's power to dismiss *sua sponte* ends when it orders the respondent to file an answer. Pet. 21. The State instead focuses on the replacement of "shall" with "must," arguing that a judge is now compelled to dismiss a petition *sua sponte* whenever it appears that a defense applies.[3] Opp. 7. "Must" is no more mandatory than "shall,"

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[3] To the contrary, this Court has rejected the notion that a judge is required to raise a defense *sua sponte* in the post-answer context. *Trest*, 522 U.S. at 89.

however. See *Hewitt* v. *Helms*, 459 U.S. 460, 471-72 (1983). Thus, the change will not affect the circuits' disagreement over whether Habeas Rule 4 authorizes post-answer *sua sponte* dismissals.

Habeas Rule 11 addresses the role of the Civil Rules in habeas cases. The amended version states:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with *any statutory provisions or* these rules, may be applied to a proceeding under these rules.

(emphasis added). The State argues that the italicized phrase changes the result here because applying the Civil Rules to determine waiver of affirmative defenses would be inconsistent with policies behind AEDPA. Opp. 7, 9. Yet the addition of "statutory provisions" was not a substantive change given that the parallel provision of the Civil Rules, Rule 81(a)(2), already included statutes:

> These rules are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * [or] the Rules Governing Section 2254 Cases * * *.

Accordingly, the amendment to Habeas Rule 11 will not alter the circuits' conflicting analyses of whether the Civil Rules on waiver apply to AEDPA's limitations defense.

2. Putting aside these non-substantive changes to the Habeas Rules, the State's fall-back position is that "the decision below * * * reached the correct result under the prior rules." Opp. 18. This merits-based argument is not a reason to deny certiorari given the circuit conflicts over the result reached by the Eleventh Circuit. Part B of this brief addresses the State's position on the merits.

The State's only other assertions regarding conflict are easily dispatched. As to whether the Civil Rules on waiver apply, the State attempts to distinguish the Tenth Circuit's

waiver holding in *Davis* (see Pet. 10-11) on its facts, pointing out that the respondent there did not raise a limitations defense until appeal. Yet the same is true here: the State never mentioned—let alone advocated—a dismissal based on limitations in the district court at any time, not even after the magistrate judge raised the issue *sua sponte*.

Regarding the conflict over whether Habeas Rule 4 authorizes post-answer *sua sponte* dismissals, the State merely responds (at 11) that it is not "important" because there is no justification for distinguishing between pre- and post-answer dismissals. The reason courts have drawn this distinction, however, is that the text of Rule 4 authorizes only pre-answer dismissals. See Pet. 11-12, 21-22. Moreover, the State's merits argument about justification does not lessen the need for this Court to resolve the circuit split on that question.

3. The 7-5 decision by the en banc Third Circuit in *Bendolph*, which issued after Day's petition was filed, confirms the importance of the two recurring questions presented by the petition. *Bendolph* addressed AEDPA's similar limitations period for motions by federal prisoners under 28 U.S.C. § 2255.

As to the first question presented, the court reaffirmed its holding in *Robinson*, 313 F.3d at 134, 137, that "a limitations defense may be waived by a State defendant in a habeas proceeding" if it is not raised in the answer or "at the earliest practicable moment thereafter." See *Bendolph*, 409 F.3d at 160, 164. Regarding the second question, it conceded that the *sua sponte* dismissal provision of Habeas Rule 4 does not apply after an answer has been filed. *Id.* at 157. Nevertheless, the court held that the "spectrum of interests" underlying AEDPA's statute of limitations grants courts a discretionary post-answer power to dismiss untimely petitions *sua sponte*. *Id.* at 165, 167. It concluded that this power exists even when the limitations defense has been waived, *id.* at 166-67, but

that courts may not apply the defense *sua sponte* if the petitioner would be prejudiced. *Id.* at 161, 168-69.

These positions, which are quite different from the ones taken by the Eleventh Circuit below, deepen the conflict and confusion over the questions presented here. In the Eleventh Circuit, a State cannot waive the limitations defense and Habeas Rule 4 allows courts to dismiss untimely petitions *sua sponte* even after an answer is filed, regardless of prejudice. In the Third Circuit, a State can waive the defense and Rule 4 does not apply post-answer, but the policies behind AEDPA give courts a hazily defined power of post-answer dismissal that takes prejudice into account. The Sixth and Ninth Circuits agree with the Third that a State can waive the defense, but they hold that courts have no power to cure that waiver through a post-answer *sua sponte* dismissal. See p. 2 nn. 1-2, *supra*. The State's brief only adds to this confusion by advocating the Third Circuit approach instead of defending the positions taken by the Eleventh Circuit below.

These fundamental disagreements in the lower courts regarding the nature and waivability of AEDPA's limitations defense are "likely to create vast disparities concerning the treatment of government waiver between judges and from one case to the next." *Bendolph*, 409 F.3d at 175 n.27 (Nygaard, J., dissenting). This Court should step in to resolve the confusion by deciding "whether, or just when, a habeas court *may* consider a [limitations defense] that the State at some point has waived, or failed to raise." *Trest*, 522 U.S. at 90.

We note that a petition for certiorari has been filed in *Bendolph* (No. 05-3). While *Bendolph* addressed a motion by a federal prisoner under 28 U.S.C. § 2255, this case and all the others that make up the splits discussed above involve habeas petitions by state prisoners under § 2254. Because the federalism and comity concerns that the Eleventh Circuit and the State invoke to support *sua sponte* dismissal are unique to the § 2254 context, a decision in *Bendolph* would not neces-

sarily resolve this case or the splits. Therefore, regardless of how the Court rules on the *Bendolph* petition, it should grant certiorari in this case.

**B. The decision below is erroneous.**

The State devotes most of its brief to arguments on the merits. Tellingly, however, the State makes virtually no attempt to defend or rely on the reasoning of the court of appeals whose judgment it seeks to sustain. Instead, it contends that Day seeks a windfall and relies heavily on *Bendolph* and two recent decisions of this Court to support its position. None of the State's arguments withstands scrutiny.

1. Attempting to bolster the practical appeal of its position, the State contends that Day would receive a "windfall" if this Court finds a waiver of the limitations defense. Opp. 2, 15. This argument misunderstands the nature of an affirmative defense in our adversary system.

As explained in the petition, courts agree that AEDPA's statute of limitations is an affirmative defense that the State bears the burden of asserting, not an unwaivable bar to jurisdiction. Pet. 18; Pet. App. 4a; Professors' *Amicus* Br. 9-10. One purpose of affirmative defenses is to conserve judicial resources by relying on the *parties* to raise them early in the proceedings, which the State did not do here.[4] "Rescuing the [State] from its folly or inadvertence by permitting a district court to raise the statute of limitations after the parties have begun to address the merits of the petition subverts that purpose, and may even have the opposite effect." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting).

Moreover, as this Court recently held, "the potentially burdensome, time-consuming, and fact-intensive task of

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[4] Instead, the State filed a 30-page answer exhaustively addressing the merits of Day's claims several months before the district court dismissed the petition *sua sponte* based on limitations. Dkt. No. 7.

making case-specific investigation and calculation of whether the AEDPA limitations period has already run" is a task "normally and properly performed by trained counsel." *Pliler* v. *Ford*, 124 S. Ct. 2441, 2446 (2004). Having courts perform that task *sua sponte* "would undermine district judges' role as impartial decisionmakers." *Id.*

Another reason parties are required to raise affirmative defenses is that "the determination of what may be useful for the [litigant] can properly and effectively be made only by an advocate." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). There are many reasons that a State might choose not to invoke a limitations defense (see NACDL *Amicus* Br. 16-17), and it would undermine values of comity and federalism for a court to subvert such a choice by acting *sua sponte*. Thus, a ruling that affirmative defenses are waived if not raised is not a "windfall"; it is an acknowledgment that a party—not the court—is in the best position to know when its interests are at stake. Pet. 23.

2. The State next seeks refuge in *Bendolph*, asserting that because Day never contended his petition was timely, he was not prejudiced by the district court's *sua sponte* decision to apply the limitations bar. Opp. 2, 10 n.5, 17. As shown in the petition, this assertion is demonstrably wrong. In his response to the magistrate judge's order to show cause, Day argued that his petition was timely because the statutory tolling period included the time for seeking certiorari on state post-conviction review. Pet. 7 (citing Dkt. No. 13). Although both the magistrate judge and the Eleventh Circuit disagreed with this argument (Pet. App. 3a, 12a), Sixth Circuit precedent endorses it. Pet. 19-20.

Under the Sixth Circuit's rule, Day's petition was timely and the State's express concession of timeliness should have been given binding effect. *Id.* Instead, the district court prejudiced Day by *sua sponte* invoking an inapplicable defense the State correctly did not raise, thereby forcing him to

sit in prison while pursuing appeals on the limitations issue instead of proceeding with the merits of his significant claims for habeas relief. In light of this prejudice, the district court's dismissal was erroneous under *Bendolph*. See pp. 5-6, *supra*.

3. Finally, the State argues (at 2, 9, 15-16) that concerns of "federalism, comity and finality" underlying AEDPA trump the Civil Rules' principle that failure to assert a limitations defense in a responsive pleading results in waiver. The State begins (at 5-6) by quibbling about the degree to which habeas cases are civil in nature, but that is beside the point. As this Court recently confirmed, the Civil Rules apply in habeas cases "to the extent that they are *not inconsistent with* any statutory provisions or [the Habeas] [R]ules." Habeas Rule 11 (emphasis added); *see Gonzalez* v. *Crosby*, 125 S. Ct. 2641, 2646 (2005).

Under this test, the Civil Rules apply here. The State admits (and *Bendolph* confirms) that Habeas Rule 4 authorizes only pre-answer *sua sponte* dismissals. Opp. 15; *Bendolph*, 409 F.3d at 157. Thus, Rule 4 is not inconsistent with the Civil Rules' principle of post-answer waiver.

As to statutes, the State identifies no "statutory provisio[n]" of AEDPA that would be contravened if courts lacked the power to cure a State's waiver by raising limitations *sua sponte* after an answer has been filed. Nor has any court identified such a provision. The statute of limitations itself merely establishes the one-year time period and how it is calculated; nothing in it alters the ordinary procedures governing waiver and *sua sponte* consideration of limitations defenses in civil cases. See 28 U.S.C. § 2244(d); Professors' *Amicus* Br. 9-10, 14-16; cf. 28 U.S.C. § 2254(b)(3) (requiring express waiver of exhaustion defense).

Instead, the State and some courts contend that certain policy concerns underlying the AEDPA statute of limitations are inconsistent with the Civil Rules. Opp. 15; *Bendolph*, 409 F.3d at 165, 167; Pet. App. 5a. Because policy concerns are

not "statutory provisions," however, they cannot override the Civil Rules.[5] Habeas Rule 11; cf. *Gonzalez*, 125 S. Ct. at 2647-48 (considering whether substantive standards and procedural requirements in text of AEDPA were inconsistent with Civil Rule 60(b)). Moreover, if background AEDPA principles such as comity, finality, and federalism actually did prohibit courts from applying the Civil Rules to curtail the reach of the statute of limitations, this Court would not have acknowledged in *Mayle* that Civil "Rule 15(c)(2) relaxes * * * the [AEDPA] statute of limitations." 125 S. Ct. at 2572. Nor would it have held in *Gonzalez* that AEDPA did not restrict a Rule 60(b) motion concerning limitations filed more than a year after the petitioner's habeas proceedings concluded and more than four years after the limitations period expired. 125 S. Ct. at 2645, 2650.

## CONCLUSION

For these reasons, the Eleventh Circuit erred by rejecting the Civil Rules regarding waiver and affirming the *sua sponte* dismissal of Day's petition as untimely. The petition for a writ of certiorari should be granted.

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[5] Even if policy concerns were relevant, the State fails to mention significant policies in favor of holding that AEDPA's statute of limitations on habeas petitions can be waived and that courts should not cure that waiver *sua sponte*. In addition to the policies discussed in Part B.1. above, this Court has held that "the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston*, 306 U.S. 19, 26 (1939). "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). For these reasons as well as others, *sua sponte* rulings are disfavored in the habeas context. Pet. 22; Professors' *Amicus* Br. 13.

Respectfully submitted.

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